No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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Proctors for Appellees.

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Appellees.

BRIEF FOR APPELLEES.

OPENING STATEMENT.

This is an appeal from decrees dismissing libels in each of the above cases for alleged damage claimed to have been caused by delay and deviation.

The proceedings were consolidated for trial, and the consolidated actions, were, on stipulation of the parties and order of the trial court, referred to the United States Commissioner for "hearing, determination, and report." Exceptions to the answer of respondents on the issue of the alleged deviation were filed by libelants, argued by the respective counsel, and overruled by the trial court. The Commissioner, in a written opinion, made his report to the trial court, which, after setting forth the facts as found by him and the applicable law, reported that the libels should be dismissed. Exceptions were filed by appellants (libelants below) to all features of the Commissioner's report. The exceptions were overruled by the trial court. Findings of fact and conclusions of law were presented by respondents. Counter findings of fact and conclusions of law were presented by appellants, libelants below. The trial court, after due consideration, signed findings of fact and conclusions of law and ordered that judgment be entered in accordance with the Commissioner's report. The court overruled libelants' proposed exceptions and additions to findings of fact and conclusions of law and entered final decree dismissing the libels, from which final decrees appellants herein, libelants below, appeal.

All of the issues of fact and questions of law presented in these cases have been briefed and argued before the trial court and the Commissioner. There are no new issues of fact or questions of law raised by this appeal.

The issue of deviation was argued and briefed before the trial court on exceptions to the answer; be-

fore the Commissioner, following the conclusion of the hearing and upon submission of the cause; and before the trial court on exceptions to the report of the Commissioner. The facts and law on all other issues were argued and briefed before the Commissioner upon submission of the cases; and, before the trial court upon exceptions to the Commissioner's report. Thus, two distinct tribunals have had presented to them all of the facts and all of the law, and both tribunals have found no liability on behalf of appellees, respondents below, and that the libels should be dismissed. *All of the testimony in respect to the alleged contracts and shipments of the eggs, the subject matter of the litigation, was heard orally by the Commissioner in open court.* Libelants appeal on the grounds specified in assignments of errors covering exactly the same points raised by libelants in the trial court on exceptions to the Commissioner's report. The issues presented below and before this court on appeal are; first, whether the shipments were made under oral contracts of affreightment or in pursuance of written bills of lading; (The Commissioner and the trial court found that there was no oral contract between the parties hereto (Tr. 87, 100, 105) and that the rights of the parties must be determined by the bills of lading (Tr. 88, 100, 105) and, second, whether there was a breach of the contract between the parties. (The Commissioner and the trial court found that there was no breach of the contract between the parties, and no deviation (Tr. 88, 101, 105) and ordered the libels dismissed (Tr. 89).

ARGUMENT.

I. The report of the Commissioner, approved by the trial court, is presumptively correct and will not be disturbed on appeal except for manifest error.

II. The Circuit Court of Appeals will not disturb the findings of the trial court where based on conflicting testimony taken in open court except for manifest error.

III. The finding that there was no oral contract between these parties is fully supported by the evidence and should not be set aside.

IV. The finding that the rights of the parties hereto must be determined by the bills of lading is fully supported by the evidence and is in conformity with the law on the case.

V. There was no unpermitted deviation on the voyage of the "Hindanger" as contemplated by the contract between the parties and in accordance with the decisions on the subject.

VI. The decree of the trial court should be affirmed and the libels dismissed.

I.

THE REPORT OF THE COMMISSIONER, APPROVED BY THE TRIAL COURT, IS PRESUMPTIVELY CORRECT AND WILL NOT BE DISTURBED ON APPEAL EXCEPT FOR MANIFEST ERROR.

The reference to the Commissioner herein was by consent of the parties and order of court and required the Commissioner to "hear, determine and

report'' the matter. Appellants recognize (Brief, 57) the well-established principle that the findings of the special master will not be disturbed except for manifest error. This sound rule of law is so well established in this Circuit as to need little comment. In the case of *The Tourist,* 64 Fed. (2d) 669 (C. C. A. 9th), this court, in an admiralty case, affirmed the decree of dismissal of the District Court which had approved the findings of a Commissioner before whom the case was tried on a stipulation of the parties and order of the court. The trial court adopted the report of the Commissioner as its findings of fact and dismissed the libel. This court, in affirming the decree of dismissal, held (p. 670):

> ''As said by the court in William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co. (D. C.) 5 F. (2d) 731, 741, 'A preliminary question arises as to the weight which is to be given to the master's report.' If we treat the reference here as a consent reference, then the weight which is to be given to the commissioner's report and findings, which were adopted by the court as its findings, is governed by Davis v. Schwartz, 155 U. S. 631, 15 S. Ct. 237, 239, 39 L. Ed. 289, and Kimberly v. Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764. In the former case the court said:
>
> 'As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case

tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but *so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.* Wiscart v. Dauchy, 3 Dall. 321 (1 L. Ed. 619); Bond v. Brown, 12 How. 254 (13 L. Ed. 977); Graham v. Bayne, 18 How. 60, 62 (15 L. Ed. 265); Norris v. Jackson, 9 Wall. 125 (19 L. Ed. 608); Insurance Co. v. Folsom, 18 Wall. 237, 249 (21 L. Ed. 827); The Abbotsford, 98 U. S. 440 (25 L. Ed. 168).

The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in Kimberly v. Arms, 129 U. S. 512, 9 S. Ct. 355 (32 L. Ed. 764), in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet, where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the findings of a subordinate court. "Its findings,"

said the court, "like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed, under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." As the reference in this case was by consent to find the facts, we think the rule in Kimberly v. Arms applies, and, as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive.'

* * * * * * *

'In cases such as this the rule is well settled that the findings of a special master, approved by the trial court, will not be set aside or reversed on appeal except for manifest error in the consideration given to the evidence, or in the application of the law.' The Chiquita (C. C. A. 9) 44 F. (2d) 302, 303. That there was no such error here is clear. The findings are supported by the evidence, and the conclusions of law are likewise supported by the findings. This conclusion we have reached after a consideration of the entire case."

See also *The Chiquita,* 44 Fed. (2d) 302 (C. C. A. 9th, 1930); *Anderson v. Alaska S. S. Co.,* 22 Fed. (2d) 532 (C. C. A. 9th, 1927). In the latter case, the court, speaking through Judge Rudkin, held (p. 535):

"An examination of the record leads us to the same conclusion ('A more extreme case of conflicting testimony it would be difficult to imagine.'): but, if we were in doubt, we are confronted with the findings of the commissioner,

approved by the court, and in such cases the rule is firmly established that the findings will not be disturbed, except for obvious error in the application of the law, or for a serious or important mistake in the consideration of the evidence."

See also:

Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764;

Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289;

Connor v. United States (C. C. A. 9th), 214 Fed. 522;

Ross, Inc. v. Public Service Corporation of N. J., 42 Fed. (2d) 79.

The evidence amply supports the findings of the Commissioner and the trial court. There is no competent evidence contrary to the report of the Commissioner, which supports the assignments of error and there is no manifest error upon which this court could base a finding setting aside the Commissioner's report and reversing the decree of the trial court.

II.

THE CIRCUIT COURT OF APPEALS WILL NOT DISTURB THE FINDINGS OF THE TRIAL COURT WHERE BASED ON CONFLICTING TESTIMONY TAKEN IN OPEN COURT EXCEPT FOR MANIFEST ERROR.

Another sound principle of law well-recognized by this court is that the Circuit Court of Appeals will not disturb the findings of the trial court where based upon conflicting testimony taken in open court. This

principle is in addition to the one previously stated that the report of the Commissioner will not be disturbed except for manifest error. In the instant case, all of the testimony having to do with the contractual relations of the parties to this litigation and the carriage of the cargo in question, was taken in open court before the Commissioner, who had an opportunity to judge for himself of the credibility of the witnesses and arrive at sound conclusions on the basis of what he had seen and heard.

In the case of *Gray & Barash, Inc., v. Luckenbach S. S. Co., et al.,* 8 Fed. (2d) 729 (C. C. A. 9th, 1925), this court, in an admiralty case, wherein the trial court dismissed the libel, held:

> "These findings are supported by competent testimony, and the rule is universal that findings of the trial court, based on conflicting testimony taken in open court, will not be disturbed on appeal, except for plain and manifest error."

The rule is well settled in this circuit by repeated decisions of this court:

Willfaro-Willsolo, 1926 A. M. C. 32 (1925);
The Mazatlan, 287 Fed. 873 (1923);
The Beaver, 253 Fed. 312 (1918);
The Hardy, 229 Fed. 985 (1916);
The Dolbadarn Castle, 222 Fed. 838 (1915);
The Bailey Gatzert, 179 Fed. 44 (1910).

The finding of the lower court that no oral contract existed between these parties and that the rights of the parties must be determined by the bills of lading and that there was no deviation in respect to the

cargo carried under these bills of lading should not be set aside.

III.

THE FINDING THAT THERE WAS NO ORAL CONTRACT BETWEEN THESE PARTIES IS FULLY SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE SET ASIDE.

In their pleadings, appellants-libelants allege, and appellees-respondents deny, the existence of an oral contract between these parties. Appellees-respondents allege that the only contract between them for the carriage of the goods was evidenced by the bills of lading set forth in the record (Tr. 42, 43, 62, 63). Appellants-libelants sought to prove by extraneous evidence before the Commissioner the existence of an oral contract between the parties. The Commissioner found "no oral contracts were consummated between the parties" (Tr. 89). This finding was excepted to by appellants-libelants but sustained by the trial court. *No one of the witnesses for appellants-libelants claimed to have made any oral contract.* B. F. McKibben, Secretary of Pacific States Butter, Egg, Cheese and Poultry Association, told of a meeting with Mr. Wintemute, acting on behalf of respondents, February 15, 1930, and testified in answer to the first question of cross-examination (Tr. 226):

> "Mr. Graham. Q. You do not make any contention, do you, Mr. McKibben, that any agreements were reached at that meeting at all? You merely had general discussion in which each of

you expressed yourself as having in mind what you all wanted to do to develop this new business and how to ship them, or some ship to carry them?

A. *There was no definite agreement at that time. The question of rates was left to be determined later.*

Q. *All other questions having to do with the shipment were also left in abeyance?*

A. *Yes.*"

There is no contention any agreement was entered into prior to February 15th.

J. E. Rother, Sales Manager of Poultry Producers of Central California, one of the libelants, likewise testified emphatically on direct examination that no conclusions were arrived at during the meeting of February 15, and as follows (p. 237):

"Q. *Was there a rate fixed at that time?*

A. *To the best of my recollection the rate was not definitely settled.* We asked for a rate, and I am not sure about what rate we asked for at that time, but to the best of my recollection it was 30 cents a cubic foot.

Q. When the conference broke up was there any understanding that you would have further negotiations about the rate?

A. Yes, there was. *My recollection is that the conference did not settle anything more than that we were to carry on negotiations.* We saw that this steamer we had in mind, the 'Hindanger' would sail at the end of March and we were to continue negotiations about making the shipment. There were no definite terms that we would ship at."

Mr. Rother further testified that, representing the libelants in this case, he had very little part in the discussion and that the principal negotiations and conversations were carried on by Mr. Benjamin (Tr. 240). Mr. Benjamin (Tr. 239, 241) is the General Manager of Pacific Egg Producers, which Company handles the export business for the libelants (Tr. 239). Mr. Benjamin was not produced as a witness, nor was his testimony taken by deposition.

Under cross-examination, Mr. Rother definitely stated that he made no contract for the libelants (Tr. 241, 243):

> "Mr. Graham. Q. Did you, representing the Poultry Producers Association at any time thereafter, make any contract with the parties respondent in this action as to the carriage of these eggs on the 'Hindanger',—just limiting it to yourself representing the Poultry Producers Association?
>
> A. Did I make any contract? Is that the question?
>
> Q. Yes.
>
> * * * * * * *
>
> A. As I said, I did not carry these negotiations on.
>
> Mr. Graham. Q. In other words, you did not enter into any contract for the Association yourself?
>
> A. I was there and was interested because my duties made it necessary, but I know what was going on and because part of my work was to assemble the eggs for shipment and the shipping date was very important, but *the actual negotiations at that meeting were mostly con-*

ducted by Mr. Benjamin with Mr. Wintemute.

Mr. Graham. Of which you have no particular knowledge, so I move to strike out the answer of the witness as not responsive.

The Commissioner. Q. *Did you yourself have any kind of an agreement with the respondent, you personally?*

A. *I did not.*

Mr. Graham. Representing his association?

The Commissioner. Representing his association, of course.

Mr. Graham. You did not?

A. I did not.

Q. *Just a minute, you at that time, neither entered into a contract nor did you at any other time enter into a contract for shipment of eggs, you representing yourself and your association?*

A. *I could not say that I did.*

The Commissioner. Your answer would be no?

A. I know this, we shipped the eggs.

* * * * * * *

Q. When was the contract that you testified to have been entered into, made with the respondents, on what date?

A. I could not answer that question because *Mr. Benjamin carried on these negotiations and I am not certain when they were completed.*

Q. *So that as far as you are concerned, you, acting for the Poultry Producers Association, did not make any contract? I think you said that was a fact?*

A. *I did not make any contract.*"

John Lawler, General Manager of Poultry Producers of Central California, and Secretary of Pacific Egg Producers Cooperative, testified that he was

not in direct contact with the preliminary negotiations during the period testified to by Mr. Rother, but that he received reports from Mr. Rother and Mr. Benjamin. On direct examination by his counsel, after having testified that he told Mr. Wintemute on March 10th over the telephone, "that he would ship from 10,000 to 15,000 cases of eggs on the "Hindanger" (Tr. 261, 262), testified as follows (Tr. 262):

> "Q. What was stated in that conversation, Mr. Lawler?
>
> A. I confirmed the space on the 'Hindanger' which had been arranged for on the Saturday previous by Mr. Van Bokkelen.
>
> Q. What did you tell him?
>
> A. I told him that we would ship from ten to fifteen thousand cases of eggs on the 'Hindanger'.
>
> Q. Was the rate agreed upon?
>
> A. The rate was agreed upon some time prior to that. *I had no negotiations on the rate as far as I can remember.*"

And, further (Tr. 263):

> "Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date?
>
> A. The contract with whom?
>
> Q. With Westfal, Larsen & Company through the General Steamship Corporation?
>
> A. The contract, or the arrangement was made with Walter Van Bokkelen and he telephoned that I had to confirm it with Mr. Wintemute."

The foregoing covers the testimony of all of the witnesses for appellants who testified in respect to

the alleged contract. *Not one of them contended he made any oral contract with these appellees,* and in fact each one denied it. The testimony is positive that at no time prior to the time of shipment and the issuance of the bills of lading was there any agreement, oral or otherwise, between these parties in connection with the shipment of eggs which thereafter moved on the "Hindanger". No authority need be cited to this court to establish the elements of a contract, whether written or oral, and this court need hardly be reminded that the rate to be charged by the steamship company for carrying cargo is of the greatest importance and an essential element to any such contract.

The testimony of Messrs. Wintemute and Reali, witnesses for appellees (Tr. 281 ff. 378 ff.) establishes that at no time prior to the shipment and issuance of the bills of lading was there any contract between these parties.

The witnesses for appellees deny having made any oral contract with appellants.

(Wintemute, Tr. 187):

> "A. I did not begin negotiations with them. I began negotiations with Mr. Walter Van Bokkelen about the first of March.
>
> Q. That was the only negotiations you had in reference to these shipments?
>
> A. Yes.
>
> Q. Had you had any prior ones wherein you met Mr. Benjamin and Mr. Rother?
>
> A. Not in connection with the 'Hindanger' shipment."

(Wintemute, Tr. 200):

"Mr. Graham. Q. Mr. Wintemute, did any of these conversations which you had with Mr. Benjamin result in the booking of any cargo by you for Pacific Egg Producers for shipment on your vessel at that time, and particularly the 'Hindanger'?

A. No."

(Wintemute, Tr. 283, 284):

"Q. You heard the testimony given that there was a meeting in your office on the 15th of February?

A. Yes.

Q. You were present at that meeting?

A. Yes.

Q. Do you remember who else was present from the General Steamship Corporation or Westfal, Larsen Company?

A. I believe that Captain Petersen, to the best of my recollection was there, representing Westfal, Larsen Company line.

Q. Had you had any previous meetings with the libelants or their representatives?

A. Yes I had.

Q. About when were those previous meetings?

A. In checking over my records, and my memory, I had meetings right along at various times, but the first meeting, to my knowledge, was the latter part of January or early in February.

Q. With whom were those meetings?

A. Mr. Benjamin, a representative of the egg concerns.

Q. As a result of those meetings was any cargo booked for shipment on any of your vessels?

Mr. Sapiro. We will object to that as leading and calling for the conclusion of the witness as to

what was a result of the meetings. The only thing he can say is, what happened.

Mr. Graham. All right, I will withdraw the question.

Q. What happened as a result of those meetings?

A. Nothing happened."

(Wintemute, Tr. 286):

"Mr. Graham. This conversation that you had in your office in February, 1930, with the representatives of the libelants was about what ship, Mr. Wintemute?

A. About the motorship 'Villanger'.

Q. Did you have a general discussion at that time?

A. We had general discussion at that time, having to do with the motorship 'Villanger' in particular.

Q. At that meeting on the 15th of February did you reach any conclusion, Mr. Wintemute, any contract for the shipment of eggs on the 'Villanger'?

A. No, there was no contract made.

Q. Were there any eggs shipped thereafter on the 'Villanger' by these libelants or either of them?

A. No."

(Wintemute, Tr. 289-290):

"Mr. Graham. Q. Will you state what was said at that meeting with respect to the shipment of eggs on the vessel on which it was to go?

A. The discussion, as I remember it, not only from my records, but from my memory, centered primarily on the possibility of the Pacific Egg Producers making a shipment of eggs to the

Argentine on the motorship 'Villanger', and the whole negotiations centered upon the question of rates.

Q. At that time was the 'Villanger' in a position to be able to load eggs had you been able to conclude negotiations?

A. She was."

(Wintemute, Tr. 294-298):

"Q. Now going back to the meeting of February 15, after that meeting broke up, did you have any further meetings from then on until the time of the shipment of these goods on the 'Hindanger', with the libelants or their representatives?

A. I can't say that we had any further meetings specially in connection with the 'Hindanger' because the 'Hindanger' was not the point of the meeting at the time.

Q. You testified that your meeting on the 15th of February related to the 'Villanger'. Did you close any shipments for the libelants on the 'Villanger' at all?

A. No.

Q. As time developed did the position of the 'Hindanger' and 'Villanger' as far as time of departure and time of arrival at the other end, remain the same?

A. No, they changed from time to time.

Q. What was the nature of the change of those positions?

A. They became delayed in their position.

Q. Do you know whether any options were given to these libelants for shipment of eggs on the 'Villanger' or 'Hindanger'?

A. We offered the space for a minimum of 12,000 cases on the motorship 'Villanger' in Los Angeles, with the McCormick Steamship Com-

pany, who gave them an option of 6000 cases in their steamer 'West Iris' which was the basis of our agreeing to meet their requisition for 40 cents a cubic foot rate.

Q. Were any shipments made on that 40-cent rate on the 'Villanger'?

A. Swift & Company, as I previously stated.

Q. Were any shipments made by these libelants on the 'Villanger'?

A. None.

Q. Following the reduction of the rate to 40 cents for the 'Villanger' was there a subsequent reduction of rates on the 'Villanger'?

A. Yes.

Q. When was that reduction in rates made, if you know?

A. May I make a correction to that last answer? I do not think I got your question right. May I change that now?

Q. What is the fact?

A. I am trying to recall from memory the best I can.

Q. What is the fact?

A. No.

Q. That is, these libelants were not offered any rate reduced from 40 cents for shipment on the 'Villanger'?

A. As far as I can remember, no.

Q. At the time that you were working with these libelants for shipment of eggs on the 'Villanger', were you working with anybody else for a shipment of eggs on the 'Villanger'?

Mr. Sapiro. I do not believe that would be material. If it has any relevancy I would not object to it.

Mr. Graham. I will withdraw it. Q. Now coming to the 'Hindanger' do you recall what your

first conversation was with these libelants or their representatives in connection with the shipment of eggs on the 'Hindanger'?

A. I believe my first conference with the egg producers in connection with the shipment on the 'Hindanger' was the conversation had with Mr. Lawler, confirming that he would supply the eggs for which space had been reserved by Mr. Van Bokkelen.

* * * * * * *

Q. Will you read that cable to yourself, refresh your recollection and tell me what happened on March 8th in connection with the shipment of eggs on the 'Hindanger'?

A. On the morning of March 8th Mr. Walter Van Bokkelen arrived in San Francisco and called on me, stating that he had just come from the East by plane. I had been in telegraphic communication with him and wondered how he got here so soon. He told me that he was now prepared to ship 15,000 cases of eggs on the motorship 'Hindanger', that he wanted to give us these eggs to carry out a promise made Mr. Von Erpecom, managing director of Messrs. Westfal, Larsen & Company, made to Mr. Von Erpecom in London, at which time Mr. Van Bokkelen had discussed with Mr. Von Erpecom the possibility of Westfal, Larsen Company allocating to Mr. Van Bokkelen for operation in the Blavin line operated by Mr. Van Bokkelen between New York and Buenos Aires, the last two of the new ships then being built by Westfal, Larsen Company for the trade between the Pacific Coast and Argentine and Brazil. Mr. Van Bokkelen said he wanted to carry out his promise to Mr. Von Erpecom to give us a shipment of eggs, and accordingly he said he would ship

15,000 cases, that he was arranging with the egg people, the Pacific Egg Producers, to ship the eggs.

Q. At that time, Mr. Wintemute, did you close a contract with Mr. Van Bokkelen or not?

A. Verbally, yes.

Q. Did you agree on the rate?

A. Yes."

(Wintemute, Tr. p. 313):

"Q. Did you ever have any discussion with Mr. Benjamin as to his shipping ten to fifteen thousand cases of eggs?

A. No, sir.

Q. What was your discussion with him at that time?

A. My discussion with Mr. Benjamin at that time was in connection with the possibility of shipping eggs to Buenos Aires via the Motorship 'Villanger'. The principal item at stake was the question of freight rates.

Q. And what freight rate did Mr. Benjamin want?

A. The first meeting I had with Mr. Benjamin we talked on a rate of $1.20 per case. Mr. Benjamin after that left for Seattle and when he came back he informed us that the New York Line had reduced their rate and he thought we ought to reduce our rate to a basis of 40 cents per cubic foot, which was the equivalent of approximately 93 cents per case.

Q. Did you ever discuss with Mr. Benjamin a 30-cent rate on eggs?

A. No, sir.

Q. When was the question of the 30-cent rate on eggs first mentioned?

A. That was first mentioned by Mr. Van Bokkelen in a telegram he sent us from Kansas City on March 3rd."

This contract with Van Bokkelen was distinct from and had nothing to do with the contract between these parties. Mr. Van Bokkelen had no authority to contract for appellants (Lawler, Tr. 273).

"The Commissioner. What is Mr. Van Bokkelen's position?

A. Mr. Van Bokkelen's firm was to sell eggs in the Argentine.

Q. He is not a member of the Poultry Producers of Central California?

A. No.

Mr. Sapiro. Q. Did he have any authority to make a contract with you?

A. No."

There is no proof of an oral contract between these parties, and all witnesses, appellants' and appellee's, deny having made one. It must have been conceived by counsel, although unsupported by the facts.

IV.

THE FINDING THAT THE RIGHTS OF THE PARTIES HERETO MUST BE DETERMINED BY THE BILLS OF LADING IS FULLY SUPPORTED BY THE EVIDENCE AND IS IN CONFORMITY WITH THE LAW OF THE CASE.

The libels allege, and the fact is, that the "Hindanger" sailed from Seattle March 28th with 4000 cases of eggs on board. The bill of lading covering the shipment (Exhibit A) shows that the goods were shipped

by Washington Cooperative Egg and Poultry Association, consigned to the order of L. Van Bokkelen, Inc.; on the M. S. "Hindanger"; from the port of shipment, Seattle, Washington; to the port of destination, Buenos Aires; at the freight rate of 70¢ per case, prepaid, and bears date Seattle, Washington, March 28, 1930. The bill of lading covering the San Francisco shipment shows the shipper, Pacific Egg Producers Cooperative, Inc.; the consignee, order of Pacific Egg Producers Cooperative, Inc., notify L. Van Bokkelen, Inc.; the port of shipment, San Francisco; the vessel, M. S. "Hindanger"; the port of destination, Buenos Aires; 11,000 cases of eggs; freight 70¢ case, prepaid, and bears date April 7, 1930. The vessel sailed April 10th. The record establishes that these bills of lading were issued and accepted. There is no testimony that there was any objection to them, their conditions, the time of shipment, or arrival of the goods, or course of the voyage until the filing of these libels. These bills of lading are made up by the shippers or suppliers of the eggs themselves (Tr. 365) and are presumably correct.

Libelants allege, and respondents deny, that the shipments of eggs, the subject of this litigation, were made pursuant to an oral contract between the parties hereto. Respondents allege, and the record proves the allegation, that no oral contract was executed between these parties and that the shipments were made pursuant to the terms and conditions of bills of lading introduced in evidence by respondents (Exhibits "A"), (Tr. 42, 43, 62, 63). These bills of lading were prepared by libelants, as shippers (Tr. 365).

The Commissioner has found that the rights of the parties hereto must be determined by these bills of lading (Tr. 88). None of the witnesses for libelants denied the execution, receipt or acceptance of these bills of lading, or that they constituted the only contracts of carriage existing between these parties. *Each of the witnesses for libelants denied that he had made any oral contract with respondents for the carriage of the goods.*

In the absence of any showing to the contrary (and the record in these cases makes no showing to the contrary), the acceptance of a bill of lading is deemed in law to be an acceptance of the terms of the bill of lading and constitutes the contract between the carrier and shipper.

By stipulation it is admitted that the bill of lading covering the shipment set forth in the libel and answer is in the phrases of Exhibits "A" (Tr. 77, 81).

Exhibits "A", as heretofore set forth, show the shipper, consignee, port of shipment, port of destination, quantity of goods shipped, rate of freight, and name of the carrying vessel, and contain the terms of the contract of carriage in the customary form of bills of lading. All of the essential requisites of a contract are present. The bills of lading constituted the only contracts between these parties and establish their rights (88).

Appellees-respondents objected at the hearing to the introduction of any evidence tending to alter or vary the terms of the written contracts or bills of

lading, and argued the objections before the Commissioner, citing therein numerous decisions in support of its position (Tr. 154, 175, 182, 183). The Commissioner and the court below found that the rights of the parties must be determined by the bills of lading (Tr. 88, 100, 105).

In *The Orizaba,* 1929 A. M. C. 665, on a conflict in the testimony, the court held in respect to the bill of lading being a contract of carriage as follows (p. 668):

> "This may well be true, but I do not think it is necessary to so find, because in the absence of an agreement expressly incorporating the bill of lading, there is an implied understanding or agreement arising from common business experience, that a carrier will issue its customary bill of lading prescribing liability, and the shipper is bound by its provisions. Luckenbach S. S. Co., Inc., v. American Mills Co., 1928 A. M. C. 558, 24 F. (2d) 704; Santa Clara-Point Judith, 1928 A. M. C. 974; Henry S. Grove, 1923 A. M. C. 1021, 1024.
>
> The law requires and it must be presumed that a bill of lading will be issued.
>
> In the instant suit, however, if my finding is right, we do not have to go so far, because a bill of lading in its regular form was issued by the carrier and accepted by the shipper without the notation of short shipment, and became, as of the date of shipment, the contract of the parties, and that was not changed by the subsequent notation of short shipment."

The Henry S. Grove, 1923 A. M. C. 1021 (District Court of Washington), is a case where a firm book-

ing was made on a letter written by the carrier and accepted in writing by the shipper, and several days after the cargo was loaded and the ship sailed the bill of lading was forwarded to the libelant by mail. It was not signed by the shipper. This bill of lading contained provisions in respect to filing claims and commencing suit. In holding that the bill of lading constituted the contract between the parties, the court held, in part, as follows (p. 1024):

> "The mere booking stipulation does not preclude the issuance or acceptance of a bill of lading by the shipper as expressing the terms of the agreement between them, and when this is done both the parties are bound by its provisions. In the instant case the only agreement is to ship the cargo for a stated compensation. There are no limitations of any sort, not even perils of the sea excepted. It is apparent, I think, from the entire record that the bill of lading was understood by all of the parties as intended to express the real contract by which the mutual obligations of the parties were to be governed, The Caledonia, 43 Fed. 681; The American R. Exp. Co. v. Lindenberg, 260 U. S. 584."

Here we have a written booking admitted by the parties, and the court clearly held that the bill of lading expressed the terms of the agreement of shipment between the parties. If this were not so, it would be impossible for shippers to make, and carriers to accept, bookings for cargo to be shipped or to engage in preliminary oral or written negotiations prior to the issuance of the formal contract of carriage as evidenced by the bill of lading. The proposal

of appellants in this case is so preposterous that a citation of authorities is hardly necessary to establish that the bill of lading must be held to be the contract of carriage. Not only has no oral contract been proved, but even had one been proved, it seems clear from the better reasoned cases that the written formal contract as evidenced by the bills of lading entered into subsequent to the oral or preliminary written negotiations is the contract binding upon the parties.

In *The Surailco,* 1928 A. M. C. 682 (C. C. A. 2d), a complaint was laid upon an oral contract between the parties, which oral contract was denied by the carrier with the allegation that the goods were shipped under bills of lading. Excusing the delay complained about, Judge Learned Hand, in reversing the judgment below, held (p. 684):

> *"We agree that the bill of lading was the only contract between the parties, and that it took the place of the prior oral contract as the final memorial of the parties' obligations,* Delaware, 81 U. S. 579; Caledonia, 157 U. S. 124, 139; Guillaume v. General Transp. Co., 100 N. Y. 491, 498 (semble)."

In the case of *Western Lumber Mfg. Co. v. United States* (D. C. N. D. Cal.), 9 Fed. (2d) 1004, the respondents contended that the loading of the cargo "was done pursuant to oral arrangements made with all but one of the shippers, but on the part of the respondents the existence of any such arrangements is vigorously denied" (p. 1006). Respondents relied upon special agreements referred to in the case, ac-

cording to which no deviation took place. The court held (p. 1006):

> "With this position there are more difficulties than one. To begin with, the rule which excludes parol evidence of variations of the terms of a written contract is clearly applicable to all verbal agreements entered into prior to or contemporaneously with the execution of the bills of lading. The Delaware, 14 Wall. 579, 606, 20 L. Ed. 779; The West Aleta, supra (7 Fed. (2d) 893, 895)."

The same court, the case of *The West Aleta,* 7 Fed. (2d) 893, had before it a similar contention made by respondents. The court found that bills of lading were issued in the usual form (893), and in answer to the respondent's plea for the admission of extraneous evidence, held:

> "If there is any rule of law which is settled beyond contradiction, it is the rule that parol evidence is inadmissible to vary the terms of a written contract,"

and as in this case, the court there held that even aside from this question the evidence was wholly insufficient to establish the facts sought to be established, namely, in the instant case, that an oral contract existed. This case was affirmed by the Circuit Court of Appeals for the Ninth Circuit, and reported in 1926 A. M. C. 855, 12 Fed. (2d) 855. It was reversed by the Supreme Court on other grounds, namely, that the suit was barred by the provisions of the Suits in Admiralty Act of 1920. (*West Aleta,* 276 U. S. 202; 72 L. Ed. 531.)

In *The Sidonian,* 34 Fed. 805, the libelant, the shipper of cargo, took from the vessel a bill of lading giving it permission to call at any port or ports. Evidence was given to show that the agent of the vessel gave the shipper to understand that the vessel would not call at a quarantine port. Nevertheless, the shipper thereafter accepted the bill of lading without objection. The ship did so call and was detained, causing damage to the shipper's fruit by delay. In holding that the bill of lading governed the rights of the parties, and dismissing the libel, the court said:

> "There is evidence to show that, prior to the shipment of the lemons the agent of the shipowner gave the shipper to understand that the ship would not call at Palermo on this voyage. But it also appears that, upon the shipment of the lemons, the bill of lading upon which this action is based was issued by the ship, and received by the shipper without objection; the fact of the establishment of the quarantine at Palermo being then known to all parties. Thereafter the ship called at Palermo, that being one of the ports ordinarily touched at by the vessels of this line on their voyage to New York, and in consequence was detained by the quarantine 10 days. Upon these facts the libelant asks at the hands of this court a construction of the bill of lading so as to exclude the port of Palermo from the liberty to call mentioned in the bill of lading, upon the ground that, after the establishment of the quarantine, the port of Palermo could not be entered under ordinary circumstances, and so was not within the contemplation of the parties to the contract. But I am unable to see how such a construction can be given to the bill of lading.

> The words of the liberty to call are plain, and clearly include the port of Palermo. If the shipper had desired to exempt the port of Palermo from the liberty to call contained in the bill of lading, because of the quarantine then known to have been established, he should have procured a modification of the bill of lading. Instead of so doing he accepted the bill of lading without objection, and now brings his action upon it. It is impossible to permit him to recover in such an action, without setting aside the established rule which makes the written contract the evidence of the agreement between the parties. The libel must be dismissed, and with costs."

This case was affirmed by the Circuit Court of Appeals for the Second Circuit and is reported in 35 Fed. 534, and there can be no doubt that this is sound law.

In the leading English case on the subject, *Leduc v. Ward,* 20 Q. B. D. 475, 6 Asp. Mar. L. Cas. 290, Lord Esher, speaking for the Court of Appeals, held:

> "But if the goods have been received on board, the bill of lading is more than a receipt, it is a contract of carriage. The captain has authority not only to make a contract of carriage, but to reduce it into writing. The bill of lading is, between him and the shipper, the contract for the carriage of the goods reduced into writing. Whenever a contract is reduced into writing, that writing is the only evidence of the contract. It can only be varied by showing a usage so general that it must be taken to be imported into the contract. That is the only evidence that can be given outside the written contract. To show that the par-

ties have agreed to some other terms outside the contract is to seek to vary the terms of a written contract, and that is not allowed with regard to a bill of lading any more than it is with regard to any other contract which has been reduced into writing as the evidence of the contract. It is startling to be told that this is new law * * * ."

In the case of *The Henry B. Hyde,* 82 Fed. 681, 683, affirmed 9th C. C. A. 90 Fed. 114, in a libel for alleged damage to shipment of goods by breakage, the District Court for the Northern District of California, in relieving the vessel from liability in accordance with the terms of the bill of lading, held:

"A bill of lading is an instrument well known to the commercial law, and according to mercantile usage is signed only by the master of the ship, or other agent of the carrier, and delivered to the shipper. When thus signed and delivered, it constitutes not only a formal acknowledgment of the receipt of the goods therein described, but also the contract for the carriage of such goods, and defines the extent of the obligations assumed by the carrier. The Delaware, 14 Wall. 579. In my opinion, the rule which governs the point now under consideration is that a common carrier may, by special contract with the shipper, stipulate for a more limited liability than that which he assumes under the ordinary contract for the carriage of goods; and such special contract, in the absence of any statute to the contrary, may be contained in a bill of lading signed by the carrier alone; and the acceptance of such bill of lading by the shipper at the time of the delivery of his goods for shipment, in the ab-

sence of fraud on the part of the carrier, is sufficient to show the assent of the shipper to the terms set out in the bill of lading. It is the rule, rather than the exception, for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms and conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading, and this I understand to be the rule sustained by the supreme court of the United States in the case of Bank of Kentucky v. Adams Express Co., 93 U. S. 174, and is supported by the following well-considered cases: Kirkland v. Dinsmore, 62 N. Y. 171; Grace v. Adams, 100 Mass. 505; Dorr v. Navigation Co., 11 N. Y. 485; Railroad Co. v. Pontius, 19 Ohio St. 221; McMillan v. Railroad Co., 16 Mich. 79. In the case last cited, Mr. Justice Cooley, speaking for the court, said:

> 'Bills of lading are signed by the carrier only; and, where a contract is to be signed only by one party, the evidence of assent to its

terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts; and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing.' "

In *McMillan v. Michigan Southern etc. R. R. Co.*, 16 Mich. 79, 112, Mr. Justice Cooley said:

"A bill of lading proper is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper, to be conveyed on the terms therein expressed, to their destination, and there delivered to the parties therein designated. Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transportation, and is the measure of their rights and liabilities, unless fraud or mistake can be shown. * * *

Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in its receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing.

In Glyn v. East & West India Dock Co. (1882), 7 A. C. 591, 596, Lord Selbourne said:

'The primary office and purpose of a bill of lading, although by mercantile law and usage

> it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner.'
>
> In the Supreme Court in The Delaware, 14 Wall. 579, it was held that the bill of lading imported a contract and that evidence to vary it ought not to be admitted.
>
> And Carver on Carriage of Goods by Sea (6th ed.) Sec. 50, speaking of a bill of lading, states that it 'sets out the fact that the goods have been shipped and the terms upon which they are to be carried and delivered'."

In *The Delaware,* 81 U. S. 579, 20 L. ed. 779, the Supreme Court of the United States held, in part, as follows:

> "If there is any rule of law which is settled beyond contradiction, it is the rule that parol evidence is inadmissible to vary the terms of a written contract."

In that case the defense for non-delivery, as set up by the respondent, was that an oral agreement existed between the libelant and the master of the vessel before the shipment of the goods or the signing of the bills of lading that the goods which were lost might be stowed on deck. The respondent insisted that the goods not delivered were stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the carrier and the shippers consummated before the goods were sent on board and before the bill of lading was executed (p. 782). The libelants objected to this evidence as repugnant to the agreement set forth in the bill

of lading—the exact position of respondents-appellees herein. The Supreme Court, in rejecting the evidence, held as follows (p. 782):

> "Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described, from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. Abb. Ship. (7th Am. ed.), 323; O'Brien v. Gilchrist, 34 Me., 558; 1 Pars. Ship., 186; Macl. Ship., 338; Emerigon, Ins., 251. Regularly the goods ought to be on board before the bill of lading is assigned, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as, if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Rowley v. Bigelow, 12 Pick., 307; The Eddy, 5 Wall., 495 (72 U. S., XVIII., 489). Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods

to the consignee or other person therein designated, and upon the terms specified in the same instrument. Macl. Ship., 338, 339; Smith's Mer. Law (6th ed.), 308. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Bates v. Todd, 1 Moo. & Rob., 106; Berkley v. Watling, 7 Ad. & E., 29; Wayland v. Mosely, 5 Ala., 430; Brown v. Byrne, 3 E. & B., 714; Blaikie v. Stembridge, 6 C. B. (N. S.) 907. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence."

And further (p. 783):

"*Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are, in general, inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract.* Ruse v. Ins. Co., 23 N. Y., 519; Wheelton v. Hardisty, 8 Ell. & Bl., 296; 2 Sm. L. Cas., 758; Ang. Car. (4th ed.) sec. 229."

In the early case of *The Golden Rule,* 9 Fed. 334, in response to a plea that parol evidence was admissible to establish an oral contract the court held:

> "Such a defense cannot be listened to, as otherwise every bill of lading could be altered or varied by the recollections of a steam-boat mate, or the interference of disinterested parties. The carrying contract, reduced to writing in a bill of lading, can no more be altered or varied by parol evidence than any other written contract. See The Delaware, 14 Wall. 579. But, outside of this, unauthorized parties certainly cannot change the contract between the ship and the shipper."

This is undoubtedly sound law. Were it not so, every shipper aggrieved in respect to the transportation of his goods would seek to set aside the written contract of carriage as evidenced by the bills of lading in favor of any oral agreement which he might be able to convince the court existed. In the instant case, respondents deny the existence of any oral agreement with these appellants and the Commissioner and the court below found that no such agreement existed.

Appellants, in their brief herein, pages 16 to 41, cite 17 decisions in support of their contention that the bills of lading herein are not the contracts establishing the rights of the parties hereto. This contention is the same contention made before the Commissioner and the court below, and is contrary to the specific finding of both the Commissioner and the court (Tr. 87, 100, 105). *It must be borne in mind that the finding of fact by the court that no oral*

contract was consummated between these parties (Tr. 87) *is a finding based upon the testimony of each of the witnesses for appellants that none of them made a contract with respondents, appellees,* and the testimony of witnesses for the respondents, appellees, that no oral contract was made with the libelants, appellants. Indeed, it can hardly be said that there is any conflict in the testimony in respect to the absence of any oral contract. All agreed that there was none between these parties. Every decision cited by appellants (their brief pages 16 to 41) herein in support of their contention that an oral contract existed were cited to the Commissioner and the court below. Not one single case referred to in that part of the brief commencing on page 16 and ending on page 41 holds anything other than that where an oral contract of affreightment is proved, it is binding upon the parties.

In the *Northern Pacific* case (Brief p. 17), an exchange of letters showed a definite offer and acceptance establishing a contract for the transshipment of goods before a definite day. Respondents' agent wrote, "I have made a contract guaranteeing delivery of this supplement at Yokohama by our S. S. Tacoma, sailing Oct. 30th" (p. 274). A definite binding contract was made long prior to the shipment or issuance of the bill of lading.

In the *Bostwick* case (Brief p. 18), a similar exchange of written correspondence created a contract.

In the *Mar Mediterraneo* (Brief p. 19) the court merely had before it exceptions to a libel alleging an

oral contract. There was no ruling on the merits, and indeed the court held that if it appeared at a trial on the merits that no oral contract had been consummated, a different situation would exist.

In the *Isle de Sumatra* case (Brief p. 19), a written agreement previous to the issuance of a bill of lading indicating the order of ports of call bound the parties.

In the *Julia Luckenbach* case (Brief p. 20), the respondent itself admitted the bill of lading not to have been the contract, agreeing with the libelant that a contract preceded the issuance of the bill of lading.

In the *Arctic Bird* case (Brief p. 21), a written contract for the carriage of goods was entered into between the parties prior to the issuance of a bill of lading, which latter the court held could not vary the terms of the previous written contract.

In the *Citta di Palermo* case (Brief p. 21), a verbal contract between the parties was proved and not denied. The shipper protested against accepting a bill of lading issued after the goods had been shipped.

In *Burns v. Burns* (Brief p. 23), after holding that the opinion of a trial judge upon conflicting evidence will be assumed to be correct on appeal, the Circuit Court held (131 Fed. 239):

> "Ordinarily, when goods are delivered to a carrier for transportation, and a bill of lading is delivered to the shipper, the latter is bound to examine it and ascertain its contents, and, if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior

> parol negotiations to vary it, nor can he set up ignorance of its contents. On the other hand, if the goods are accepted for transportation by the carrier without any receipt or bill of lading being issued, the subsequent delivery to and acceptance by the shipper or his agent of such an instrument will not constitute a binding contract, for in such cases there is no consideration for the subsequent agreement."

Both the District Court (125 Fed. 432) and the Circuit Court of Appeals (131 Fed. 238) found that a contract for the carriage of coal was entered into between the parties prior to the issuance of a bill of lading which was not delivered until after the goods were shipped.

Respondents contend (Brief p. 24) that

> "Where an oral contract is *actually* entered into between the parties, the bill of lading does not supersede that contract in the absence of proof of an intention that it should."

And further:

> "Obviously the parties would no more intend that the bill of lading should express the terms of their agreement when there was an actual meeting of the minds than when each thought that the shipments were moving pursuant to an oral contract."

Appellant's difficulty is that in the instant case no oral contract was *actually,* or otherwise, entered into and it was so found by the Commissioner and court below and admitted by libelants' witnesses, and, further, the allegation that *each,* if it refers to libelants

and respondents herein, thought the shipments were moving under an oral contract is, to say the least, a stretch of the imagination. Respondents knew these shipments were moving under the bills of lading and libelants, by accepting the bills of lading without objection, were presumed to have known the same and are bound by the bills of lading, as is established by the authorities, supra.

The *National Bank of Kentucky* case (Brief p. 25) held that if there is no meeting of the minds, no contract results. It is hardly necessary to cite any such elemental rule to this court. The meeting of the minds in the instant case resulted in a delivery and acceptance without objection of the regular bills of lading of these respondents. This rule of law is established by a long line of cases and as cited heretofore.

In the *Walton N. Moore Drygoods Co.* case (Brief p. 29), a verbal agreement for sailing on a specific date was proved and not denied. The respondent was held at fault for its error in cancelling the space on the vessel and transporting the goods at a different date.

The *Iossifoglu* case (Brief p. 29) holds nothing more than that liability may rest for proved delay.

In the *Armendaiz Brothers* case (Brief p. 30), suit was based upon an oral contract which the court found to exist, in which contract the respondent carrier had represented a sailing date as a warranty. In that case it was proved that representatives of the respondent informed the libelant in respect to the sailing date of the vessel and represented that it would be

not later than a certain date, upon which basis the libelant entered into binding contracts for the sale of its goods. Delivery permits were issued by the respondent setting forth the date when the goods should be delivered to the vessel, which was within the time originally warranted. Contrary to these agreements, the vessel sailed over a month late. In the instant case it was not established to the satisfaction of the court below that any such warranty was given by these respondents.

In the *Gray v. Moore* case (Brief p. 38), the time of arrival of the vessel was specified in the contract, and both parties contracted with regard to it.

In *The Texandrier* case (Brief p. 39), the contract of affreightment specified the arrival time of the vessel.

In the *Bolle Watson* case (Brief p. 39), a contract was agreed upon for the time of sailing of the vessel.

In the *Williams Steamship Company* case (Brief p. 20), a definite contract to load on a given date was found to exist by reason of a notification given by the respondent to the libelant.

In the *Boak* case (Brief p. 40) and in the *Cohn* case (Brief p. 40), prior contracts were proved.

Not a single one of these cases can materially aid this court. In the light of the evidence, which fails to establish the existence of any such alleged oral or prior contract, the bills of lading are, as found by the Commissioner and court below, the only contracts between these parties and determine the rights of the parties.

V.

THERE WAS NO UNPERMITTED DEVIATION ON THE VOYAGE OF THE "HINDANGER" AS CONTEMPLATED BY THE CONTRACT BETWEEN THE PARTIES AND IN ACCORDANCE WITH THE DECISIONS ON THE SUBJECT.

Having established that the bills of lading are the only contracts between these respondents, the law is well settled that no unpermitted deviation was made by the respondents in the voyage from the Pacific Coast to Buenos Aires. The evidence shows that all of the ports at which the vessel stopped were ports between the loading port and the discharge port named in the contracts of carriage as evidenced by the bills of lading. The bills of lading permitted the vessel (Tr. 154) "either before or after proceeding toward the port of discharge, to proceed to said port via any port or ports in any order or rotation, outwards or forward, whether in or out of or in a contrary direction to or beyond the customary or advertised route. * * *"

In the instant case, the schedule of ports at which the vessel called from the time it left Seattle, Washington, March 28, 1930, until it arrived at Buenos Aires on May 29, 1930, is shown by stipulation entered into between the parties (Tr. 78, 81) and indicates, and as is disclosed by the map, that the ports of call complained of by appellants, Bahia and Pernambuco, are in geographical order between the Pacific Coast and Buenos Aires.

The Commissioner and the court below found (Tr. 88, 101, 105) that stopping and discharging at the different ports in geographical rotation was not a

deviation; that there was no negligent delay shown, and the time consumed on the voyage was not a deviation. We submit that in view of the facts of the case and the great weight of authority, this finding is sound and should not be set aside.

Appellants suggest that the court might find that the shipments moved under an implied contract (Brief p. 41). It is proved that the shipments moved under a written contract, as evidenced by the bills of lading.

Appellants next suggest that this court must determine as an original proposition the voyage which the carrier was obligated to make. The voyage the carrier was privileged to make was that contemplated by the contracts of carriage as evidenced by the bills of lading considered in relation to the decisions of innumerable courts construing similar contracts.

Libelants raised this issue of deviation in their libel and in their exceptions to respondents' answer, which exceptions were argued before the trial court and overruled. The same point was raised and argued before the Commissioner, with a finding that no deviation occurred. The same point was raised and argued before the trial court on exceptions to the Commissioner's report. The trial court likewise found that no deviation existed.

The decisions cited in appellants' brief (pp. 40 to 46 inclusive) were all presented below. None of them have any bearing on the instant case in the light of the liberties permitted by the bills of lading or contracts of carriage.

In *The Pinellas* case (Brief p. 42), the court specifically found (1929 A. M. C. 1301, at 1314) that no permission was given by the bills of lading for the vessel to be towed, which was the act complained of, and in the absence of any such permission, the court naturally concluded a deviation had occurred.

In *The Robin Hood* case (Brief p. 43), the vessel called at a port in the reverse order en route to the port of discharge and not at a port on the route between the two ports named in the bill of lading. As the court held, "The ship had to retrograde", and as this was not a liberty permitted in the bill of lading, it was held to be a deviation.

In *The Hermosa* case (Brief p. 23), the vessel was held to have been unseaworthy, causing an unwarranted delay, by reason of the intoxication of the master.

In *The San Giuseppe* case (Brief p. 24), the court held the vessel liable for an unwarranted delay due to the lack of diligence of the owners in getting a crew and repairing the vessel with all the cargo on board. In both of the last two mentioned cases, the cargo was loaded on board the vessel and the delay occasioned after the loading and prior to the sailing. Certainly no such situation exists in the instant case.

In the case of *General Hide & Skin Corporation* (Brief p. 45), after commencement of the voyage, on a course indicated by the advertisements, and as contemplated by the parties when the voyage commenced, the vessel was diverted to a longer course, through the Suez Canal. In the instant case, there was no

change of course at any time. When the vessel set sail from Pacific Coast ports of North America, it intended to and later did call at all of the ports of call in South America as contemplated. There was no diversion en route as was the situation in the cited case.

We have disposed of all the cases of deviation cited by appellants in their brief and claimed to apply in the instant case. It is submitted that none of them are applicable. As stated, the voyage of the "Hindanger" was not a deviation, and the ports of call were made in geographical order between the loading and discharging ports.

In a leading case in the Ninth Circuit—that of *Tokuyo Maru (W. R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha)*, 7 Fed. (2d) 889, 1925 A. M. C. 1420, decided in 1925, the court held, in part, as follows, after referring to numerous decisions, both English and American, on the subject of deviation:

> "As a conclusion from all the cases, it is apparent that the 'general liberty' clause is not treated as of 'no effect'. It is a stipulation of the parties, to be given effect, like other stipulations, in so far as it does not conflict with the Harter Act (Comp. St. Secs. 8029-8035), or the general purpose and policy of the law, or the real intent of the contract between shipper and carrier. It may be fairly said that reservations by a carrier of general liberties of departure from the route of the contractual voyage must be read in due relation and subordination to the main commercial purpose of the contract of affreightment, and as a matter of law will justify only such devia-

tions from that route as are consistent with that particular commercial purpose.

The propriety of any particular deviation is a question of fact in each case and there is no fixed rule for such determination. It is a question of inherent reasonableness, and pertinent to the inquiry of the surrounding circumstances, namely the commercial adventure, which is the subject of the contract, the character of the vessel, the usual and customary route, the natural and usual ports of call, the location of the port to which the deviation was made, and the purpose of the call thereat."

It is submitted that the propriety of the particular voyage pursued by the vessel is a question of fact which must be determined by the court in the light of all of the circumstances applicable to the situation at hand and that question of fact has been resolved in favor of respondents by the trial court and should not be disturbed. Such is the ruling of the foregoing decision. This case was affirmed by the Circuit Court of Appeals 9th Circuit and is reported in 1926 A. M. C. 862, 12 Fed. (2nd) 519.

That the liberty given under the most restricted clauses in general use permits of the calling at ports between the two named termini and in geographical order has long since been determined. As was held by the court in the foregoing case (p. 891):

"The foundation for most of the cases upon general liberty clauses in bills of lading seems to be the opinion of Lord Herschell in Glynn v. Margetson (1893), A. C. 351. The principle laid down is as follows: 'The ports, a visit to which

would be justified under this contract, will no doubt differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must in my view be a liberty consistent with the main object of the contract, a liberty only to proceed to and stay at ports which are in the course of the voyage. In that, of course, I am speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed, that was argued by the learned counsel for the appellants), inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports in the way between Malaga and Liverpool, and those are the ports at which I think the right to touch is given.' "

The decision in *Glynn v. Margetson* is undoubtedly one of the outstanding decisions of the English courts on the subject of deviation. Since that decision and the earlier American rulings on the subject, vessel owners have gradually enlarged the liberties contained in the contracts of affreightment permitting a wider scope than the voyages pursued, but in no case, it is submitted, have the courts of England or the United States held a call at ports in geographical order between the named termini in a bill of lading to have been an unwarranted deviation or in violation of the Harter Act.

In the case of *The Emelia S. de Perez,* 1923 A. M. C. 42, affirmed 288 Fed. 1019, Judge August Hand,

then and now a leading authority on admiralty matters, held that a vessel carrying cargo to fourteen Spanish ports which proceeded 125 miles beyond the port of Valencia, to which the goods were consigned, and transshipped them back was not liable for deviation and that the vessel's course was not unreasonable:

> "The ship *Emelia S. de Perez* was chartered by the claimant, Ocean Transportation Company, for a trip to Cadiz and Barcelona, but took a cargo for fourteen different Spanish Ports. It was the custom of the claimant to transship cargo for the North of Spain at Cadiz, and for the South of Spain at Barcelona. Accordingly the ship did not stop at Valencia but landed the merchandise at Barcelona and transshipped it by steamer back to Valencia, a distance from Barcelona of about one hundred and twenty-five miles. She left New York May 26, 1916, arrived at Barcelona June 6, and at Valencia June 7. The libel is filed for damages caused by the delay and alleged deviation in not going direct to Valencia.
>
> If the liberal clause of the bills of lading is to be given any latitude at all, it should cover such a comparatively small departure from the straight route to Valencia as occurred here. I can see no practical difference between this case and the deviation from New York to Philadelphia which was justified by Judge Learned Hand in his unreported opinion in the *Blandon,* dated March 30, 1922. It is true that in the *Blandon* the ship did proceed to her destination, but the clause here permitting the vessel to transship was as applicable to a near port beyond Valencia as to Cadiz which was much farther than Barcelona from Valencia. The bills of lading here per-

> mitted the vessel not only to go out of the customary route and to transship, but also to proceed beyond. The question is really one of degree and reasonable conduct and I think the ship was justified in doing what it did here. South etc. Line v. London Stores, 255 Fed. 306; The Kansas, 87 Fed. 766; Hadji Ali Akbar & Sons v. Anglo-Arabian and Persian S. S. Co. (1906), 11 Commercial Cases, p. 219."

In that case the bill of lading permitted the vessel to deviate, "to proceed to the port stated in this bill of lading, via any port or place en route or beyond, in any order, whether in or out of the customary or advertised route for any purposes whatever * * *"

In the case of *The Blandon,* 1923 A. M. C. 242, Judge Learned Hand held that a vessel carrying goods under a bill of lading from New York to Valencia which provided in part as follows:

> "with liberty to call at any port or ports in or out of the customary route in any order",

had not committed a deviation by stopping at Philadelphia after loading at New York and before proceeding to Valencia.

In the case of *The Panola,* 1925 A. M. C. 1173, the Circuit Court of Appeals for the Second Circuit had before it a claim for alleged deviation and delay on a cargo shipped from Philadelphia to Helsingfors, Finland, the contention being that after the vessel had loaded the cargo at Philadelphia, a voyage to New York and return to Philadelphia before putting out for Finland constituted a deviation and rendered the

vessel liable. In the cited case the bill of lading provided, in part, as follows:

> "1. * * * The vessel with the goods on board, either before or after proceeding toward the port of discharge, may remain in port, proceed by any route and deviate from or change the advertised and intended route at any state of the voyages and may proceed to and stay at any places whatever, although in a contrary direction to or outside of, or beyond the usual route to the said port of discharge once or oftener, in any order, backwards or forwards, for loading and/or discharging cargo, fuel, stores, or passengers, and/or for any purpose whatsoever, that in the opinion of the shipowner or master may seem advisable. This liberty is not to be considered as restricted by any words of this contract whether written, stamped or printed."

In relieving the vessel owner from liability, the court held, in part, as follows:

> "In the absence of some agreement to the contrary a voyage must be commenced without needless delay, and must be prosecuted without unnecessary delay or deviation. The shipowner's agreement is that he will be diligent in transporting the goods to their destination and that he will do so without unnecessary deviation. And there can be no doubt that if the cargo which was to be carried to Finland by the Panola had not been received under such a contract as is disclosed in this record, and which gives a wide liberty to do things which otherwise would be deviations from the voyage, a liability on the part of the shipowner for such delays as oc-

curred in this case could not be successfully controverted.

It seems to us equally plain that under the bills of lading issued and accepted without protest in this case, and the wide liberty contracted for, the shipowner is not liable for the delay which occurred in the transportation of the cargo herein involved assuming the agreement is valid.

* * * * * * *

But no case has been called to our attention which holds that such a provision as that found in the bills of lading herein involved is void, and we are not prepared to hold it to be void. While the provision in question cannot be construed to be void or as intended to confer upon the shipowner an absolute and unrestricted liberty to delay for any length of time and for any reason or no reason, the transportation of the goods, still the intention of the parties must be so restricted and limited as to apply only to delays fairly ancillary to the prescribed voyage. In effect the promise of the shipowner was to carry the goods to their destination as soon as the reasonable arrangements of the carrier, respecting the voyage, would allow."

A thorough review of recent decisions on the subject is contained in the decision of the Circuit Court in the cited case, to which reference is respectfully made.

In the case of *The Frederick Luckenbach,* 1926 A. M. C. 1468, on a voyage from Portland, Oregon, to New Orleans, a vessel was permitted, after sailing from Portland, to proceed to Seattle before continuing on to New Orleans without the same being deemed to have been a deviation.

In the case of *The Eastern Tempest,* 1928 A. M. C. 70, the court had before it a situation where a vessel with a shipment of apples from New York to Hull proceeded via St. John, New Brunswick. The court held this to be no unwarranted deviation, and in so ruling, held, in part, as follows:

> "The bill of lading provided for the transportation of apples received in apparent good order 'by the steamship Eastern Tempest, now lying at the port of New York and bound for the port of Hull, or following or subsequent steamer, with liberty, in addition to any liberty expressed or implied in this bill of lading, to proceed to and use any port or ports, in any rotation for any purposes whatsoever, whether in or out of, or beyond, the customary or advertised route, and all such ports shall be deemed to be included in the intended voyage.'
>
> * * * * * * *
>
> On September 26, the steamer sailed from New York and proceeded to St. John, New Brunswick, where she arrived September 29, and where she loaded a large cargo of sugar. She sailed from there October 3rd and reached Hull October 19, with the apples in a damaged condition.
>
> * * * * * * *
>
> The libellant contends that the Eastern Temptest deviated by going to St. John, and that the deviation deprived the respondent of all benefits of the terms of the bill of lading and rendered the respondent liable as insurer for all damage suffered by the apples during the voyage, no matter from what cause arising. See Sarnia, 278 Fed. 459, 463; St. John's N. F., 280 Fed. 553, 556, affirmed, 1923 A. M. C. 1131, 263 U. S. 119, 124.

The Eastern Temptest was advertised as sailing for Hull without any reference to her going to St. John. Almost all respondent's Hull-Newcastle steamers made direct voyages to Hull and Newcastle. This was the only voyage to St. John made by any of respondent's Hull-Newcastle steamers up to that time.

There is no evidence that any other steamer bound from New York to British ports ever called at St. John.

In Panola, 1925 A. M. C. 1173, the Circuit Court of Appeals of this circuit considered a similar provision and held that the Panola which on August 31, 1921, at Philadelphia, accepted merchandise consigned to Helsingfors, Finland, and which was expected to begin her voyage from Philadelphia, September 5th, 1921, did not deviate by remaining at Philadelphia to September 8th, 1921, then going to New York, remaining there till September 30, 1921, and then returning to Philadelphia where she remained till October 5, 1921.

In Blandon, 1923 A. M. C. 242, 28 Fed. 722, approved in Panola, the Blandon loaded cargo at New York for Valencia, Spain, then proceeded to Philadelphia to load additional cargo, and returned to New York for additional cargo before sailing for Valencia. Judge Learned Hand said: 'Yet it was expressly agreed that the port might be "out of the customary route". What more limited sense can those words mean than a stop at a place some thirty hours away? It is said that the clause will allow only reasonable deviations, and this is indeed true, since such a clause is to be construed in its context. For example, it

might not allow a side voyage to Tampico or Galveston; certainly it would not permit a call at Rio or Montevideo. But it must mean to give the ship permission to steam by a different route from that she was otherwise bound to take, besides giving her leave to make ports of call en route, that is, in the customary route. *Such permission involves delay and was meant to involve delay. When contained in a bill of lading for a mixed cargo, it must be read as intended to give the ship some latitude in making up that cargo.'*

* * * * * * *

Under such circumstances, I can not find that the Eastern Tempest deviated by going with the apples to St. John, only 168 miles out of her direct course, for additional cargo.

Proctor for libellants having admitted that 'We are clear out of court unless we can show deviation', there must be a decree for respondent dismissing the libel."

In the recent case of *Callister v. United States Shipping Board Merchant Fleet Corporation,* 21 Fed. (2d) 447, affirmed 30 Fed. (2d) 1008), suit was commenced for the recovery of damages to 4000 barrels of apples carried from New York to Alexandria, Egypt, by the steamship "Half Moon". It was contended that the vessel deviated by not making Alexandria as the first port of call. (A similar contention is made in the instant case.) In the cited case, the court held as follows (p. 450):

> "The securing of sufficient freight for the East Indies when outward bound on the voyage was not possible, and the ships of the Kerr Line and other ships bound for the East Indies were in the

habit of taking cargo for Mediterranean ports, the ship in question, the Half Moon, having stopped at Genoa on her previous voyage, and the West Mahomet, the last vessel to sail in this service before the voyage of the Half Moon, had also stopped at Genoa.

The bills of lading prepared by Barr, as well as the copy of the bill of lading attached to and made part of the agreement of November 1, 1922, provided:

> 'With liberty either before or after proceeding toward the port of discharge to proceed to, or toward, call, enter, or stay at any ports or places whatsoever, although in a contrary direction to, or out of, or beyond, the route to the said port of discharge, once or oftener, in any order backward, or forward, for loading or discharging fuel, cargo, or passengers, or for any purposes whatsoever, and the same shall not be deemed a deviation, but shall be deemed included within the intended voyage.'

Torre Annunziati was a stop on the customary route of vessels in that service, and in making that stop the distance was increased not more than 180 to 250 miles over the direct course from New York to Alexandria, and the stop at Torre Annunziati was within the liberty accorded to the Half Moon in the usual bill of lading of the Kerr Line and the bill of lading prepared by Barr and executed by the Kerr Line. The Sidonian (D. C.) 34 F. 805, affirmed (C. C.) 35 F. 534; The Panola (C. C. A.) 9 F. (2d) 733, 1925 A. M. C. 1173, at page 1185."

From the foregoing decisions, we submit that it is apparent that the provisions of the bill of lading in

the instant case applicable to the voyage being pursued from the Pacific Coast to Buenos Aires with calls at intermediate ports en route in geographical order are not such as to be avoided by reason of any provisions of the so-called Harter Act or otherwise. Indeed, as was held in the *Tokuyo Maru* case, the question of the propriety of a particular voyage is one of fact, having regard to the terms of the bill of lading and the circumstances surrounding the carriage of the goods in question. The Commissioner and court below found as a fact that no deviation or delay was occasioned and these findings should not be disturbed on appeal. It is further submitted that, as a proposition of law, the voyage of the "Hindanger" and its calls at intermediate ports in geographical order was proper and did not constitute a deviation.

The deviation complained of by libelants consisted of two alleged violations of the carrier's contract: (1) a calling at ports not properly within the voyage, which we have disposed of heretofore; and (2) a delay incidental to the voyage. Respondents, appellees, denied both of these contentions. The Commissioner and the court below found (Tr. 88, 101, 105) that no negligent delay has been shown, citing decisions (Tr. 89).

It is denied that there was any agreement concerning the dates of arrival and departure as alleged in the libel. It has been found that no contract existed prior to the execution and delivery of the bills of lading, which are silent in this respect.

In the leading case of *The Panola*, 1925 A. M. C. 1173, the court held that a delay of thirty-five days

on a voyage from Philadelphia to Helsingfors was not unreasonable for a general ship. This voyage from Philadelphia to Helsingfors is about 4000 miles. The voyage from Seattle to Buenos Aires is 9511 miles, and from San Francisco 8699 miles. The maximum delay alleged in the libel is nineteen days. We submit that there was no such delay and that at the time the goods were shipped the vessel was not scheduled to arrive in Buenos Aires on May 10th. The subject of delay is treated in the case of *The Panola* as follows:

> "In the absence of some agreement to the contrary a voyage must be commenced without needless delay, and must be prosecuted without unnecessary delay or deviation. The shipowner's agreement is that he will be diligent in transporting the goods to their destination and that he will do so without unnecessary deviation. And there can be no doubt that if the cargo which was to be carried to Finland by the Panola had not been received under such a contract as is disclosed in this record, and which gives a wide liberty to do things which otherwise would be deviations from the voyage, a liability on the part of the shipowner for such delays as occurred in this case could not be successfully controverted.
>
> It seems to us equally plain that under the bills of lading issued and accepted without protest in this case, and the wide liberty contracted for, the shipowner is not liable for the delay which occurred in the transportation of the cargo herein involved assuming the agreement is valid.
> * * * * * * *
>
> But no case has been called to our attention which holds that such a provision as that found

in the bills of lading herein involved is void, and we are not prepared to hold it to be void. While the provision in question cannot be construed to be void or as intended to confer upon the shipowner an absolute and unrestricted liberty to delay for any length of time and for any reason or no reason, the transportation of the goods, still the intention of the parties must be so restricted and limited as to apply only to delays fairly ancillary to the prescribed voyage. In effect the promise of the shipowner was to carry the goods to their destination as soon as the reasonable arrangements of the carrier, respecting the voyage, would allow.

So far as this unsatisfactory record discloses, the ship on her arrival at Philadelphia and New York cargo in her hold for discharge. After she had unloaded some of her cargo at Philadelphia she went to New York to discharge her New York cargo. This having been done, she loaded there certain cargo and then returned to Philadelphia to fill her holds. The delay at New York was due to the fact that the owner rearranged his cargo commitments—having eliminated some of his ships. The right 'to remain in port' given by the bill of lading justified holding the Panola until the owner could distribute his cargo between his various ships. Under the contract the owner was not obliged to dispatch the ship with half filled holds, or to leave unlifted any part of the freight he could carry. If it was necessary to eliminate a ship and consolidate cargoes it was not unreasonable to do it.

* * * * * * *

One of the leading cases holding that a shipper cannot recover damages for the loss of a market

is that of The Parana, 2 P. D. 118. The case was decided in 1877 in the English Court of Appeal. The ship which started from Manila and was to proceed to London was on the way from 65 to 70 days longer than the fair average time for such a voyage. She carried among other things a cargo of hemp. There had been a fall in the price of hemp between the time when the ship ought to have arrived and the time when she did arrive, and the hemp was finally sold at a considerable loss. The court, unanimously reversing the judgment of the Admiralty Division, held that the consignee was not entitled to recover damages arising from the loss of the market. Mellish, L. J., writing for the court, said:

> 'The question we have to decide is whether, if there is undue delay in the carriage of goods on a long voyage by sea, it follows as a matter of course that, if between the time when the goods ought to have arrived and the time when they did arrive, there has been a fall in the price of such goods, damages can be recovered by the consignee of the goods. * * *
>
> There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived and the time when they did arrive—no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smith-

field, or fish is sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if, by reason of breach of contract, they do not arrive in time, damages for loss of market may be recovered. Of if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower.'

He stated the court's conclusion as follows:

'Therefore, upon the whole, we have come to the conclusion that the report of the registrar and merchants is right. They said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accidents such as collisions goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market; and we are of opinion that the conclusion which the registrar and merchants came to was right. The consequence, therefore, is, that the judgment of the Court below must be reversed.' ''

In the case of *The Neshaminy,* 290 Fed. 358 (5th C. C. A.), the court held the libelant not entitled to damages by reason of a decline in market value of the goods shipped on the "Neshaminy", stating as follows:

> "The decree appealed from sustained the claim of the appellee that it was entitled to recover the amount of its loss in consequence of the decline in the market price of the timber and lumber shipped between the date when it would have arrived at Liverpool if a Shipping Board steamer had been at Pensacola for loading during the first half of April, and had promptly taken aboard that timber and lumber and carried it direct to Liverpool, and the date of its actual arrival at that place. We think that above-mentioned provisions of the Neshaminy's bill of lading plainly show that it was not contemplated that the shipowner was to be liable for loss due to such delay in the arrival of the goods in question at their destination as was complained of. It was entirely consistent with the obligation incurred for the goods in question not to reach Liverpool sooner than they did. Compliance with the engagement of freight space for those goods did not involve the carriage of them directly to Liverpool, or within the time reasonably required for a voyage of a Shipping Board steamer from Pensacola to Liverpool. The shipowner would have been within its rights in making a round about voyage resulting in the ship reaching Liverpool later than it did, or in shipping or transhipping the goods in a sailing vessel which could not reasonably have been expected to reach Liverpool as soon as the Neshaminy did. The contract sued

> on did not entitle the appellee to have the goods mentioned carried promptly and directly by a steamer to Liverpool. It is not entitled to recover damages for a failure to get the benefit of a service for which it did not contract.
>
> It follows that the decree appealed from was erroneous in sustaining appellee's above mentioned claim. That decree is reversed."

We submit that this is a proper determination of the issues presented. The contract sued on in the instant case did not entitle the shippers to a direct or prompt carriage to Buenos Aires. The "Hindanger" is a general ship engaged in the carriage of general cargo, and this court will take judicial note of the fact that being so engaged it must load and discharge at numerous ports en route between the termini. Had the shipper desired immediate delivery, it should have so contracted for it. These goods would not, however, have moved on the "Hindanger" under such circumstances.

To the same effect, and holding that where a bill of lading authorized a call at the ports at which the vessel did call, the vessel owner was not liable for delay, is the case of *United States Shipping Board Emergency Fleet Corp'n v. Florida Grain and Elevator Co.* (5th C. C. A.), 20 Fed. (2d) 583. The court held that where the bill of lading exempted the vessel from liability for delay, the burden is upon the shipper to show that the delay was occasioned by the ship's negligence, and only then is the vessel liable for such delay. The Commissioner found "no negligent delay has been shown" (88).

Both Messrs. Wintemute and Reali, employees of the respondents, denied that there was any representation as to date of arrival of the "Hindanger" in South America, or the number of days which would be required for the voyage. Appellants rely upon a sailing card issued several months before the scheduled time of sailing of the vessel. At the time of the meetings between Mr. Wintemute and representatives of appellants, the former's representation as to the expected sailing dates from the two ports was one which could reasonably have been made at that meeting (February 15th) (Tr. 291-292):

> "Q. At that meeting did you have any discussion as to the time of the voyage of the 'Hindanger' from San Francisco to Buenos Aires?
>
> A. To the best of my recollection, no.
>
> Q. I show you a sailing schedule which has already been introduced in evidence as Libelants' Exhibit No. 1, and ask you when that was sent out. I think you have already testified to this, but at the risk of repetition I will ask it again.
>
> A. In November, 1929.
>
> Q. At that time will you tell me when the 'Villanger' and 'Hindanger' respectively were scheduled to sail from San Francisco?
>
> A. The 'Villanger' was scheduled to sail from San Francisco on February 12, and the 'Hindanger' from San Francisco March 18.
>
> Q. This was November, 1929?
>
> A. Yes.
>
> Q. Can you tell me whether, at the time this schedule was sent out, in November, 1929, the position of those two vessels were such that the dates indicated were your reasonable expectation?

A. Yes, they were.

Q. This was November, 1929?

A. Yes.

Q. Can you tell me whether, at the time this schedule was sent out, in November, 1929, the position of those two vessels were such that the dates indicated were your reasonable expectation?

A. Yes, they were.

Q. Does that also apply as to the arrival dates of the two vessels in South America and particularly at Buenos Aires?

A. Yes.

Q. No schedules similar to this were subsequently sent out prior to the sailing of the 'Hindanger'?

A. No."

In the case of *Kerr Steamship Company v. Petroleum Export Corporation,* 1929 A. M. C. 905, the court held that the vessel was not liable for delay in arrival where at the time the representations were made the sailing dates indicated were reasonably expected to be fulfilled.

Ralph Bybee, witness on behalf of appellants, freight agent of McCormick Steamship Company, with whom appellants testified they had had dealings in shipments to South America over vessels of the McCormick Line, testified to a voyage of 46 days from San Francisco to Buenos Aires of a shipment of 5000 cases of eggs on the steamer "West Ira" (Tr. 372-373). He further testified in respect to reliance upon a sailing schedule issued in November as follows (Tr. 376):

"Mr. Graham. Q. I have just one more question. If you received a schedule such as that shown to you by Mr. Sapiro, issued in November, 1929, covering the sailing of vessels in March and April of 1930, would you place any reliance on it at all as to the sailing date or arrival dates?

A. If it was mailed out in November I wouldn't place much reliance on it after December.

Mr. Graham. That is all.

Recross Examination.

Mr. Sapiro. Q. That is, as to the time the boat was to leave, but you would still rely on the time it would take for the boat to go on the journey, wouldn't you?

A. No, sir.

Q. If you got the same information in a letter of January 27th, would it not confirm the same time, practically?

A. You mean for that same shipment?

Q. For the same distance, from San Francisco to Buenos Aires?

A. If I get the letter a few days prior to the date of sailing I would depend on it, otherwise I would not.

Q. You would not depend on it as a shipping man?

A. No.

Q. But you don't know what the shipper would do?

A. Well, my experience has been they don't depend on it very much.

Q. When they ask you how long it takes for a vessel to make a voyage and you tell them, do you think they depend on it?

A. Yes, sir.

Q. They do depend on that?

A. Yes, when they ask me prior to or close to the time of departure of the ship; but if they asked me, on the West Ira, in November, how long it would take it to go to Buenos Aires, I would probably have told them it took 34 days.

Q. What would you have told them in January?

A. I would probably have told them the same thing.

Q. When would you have changed the time?

A. When the boat was booked—when we had bookings on the boat."

Mr. Ralph V. Dewey, whose firm, Otis, McAllister & Co., handles one of the largest exporting businesses in San Francisco, and who is familiar with the habits and customs of the trade to South America, particularly to Buenos Aires (Tr. 384), and who testified to having received one of the sailing schedules on which libelants base their claim of delay (Libelants' Exhibit 1), further testified as follows (Tr. 384):

"Q. If you received a schedule such as this, Libelants' Exhibit 1, dated November, 1929, and if you had in mind making shipments on the Hindanger, would you place any reliance on the times of departure, arrival, or length of voyage as shown on that schedule of the 'Hindanger'?

Mr. Sapiro. I object to that as immaterial, irrelevant, and incompetent. This man's opinion as to what he would do, or his knowledge of the lack of reliability on shipping schedules is not material.

The Commissioner. Well, I think that goes to the weight of the evidence. I will allow it.

Mr. Sapiro. I don't see how it is of any materiality, your Honor.

The Commissioner. It is not very material. It simply goes to the weight of it.

A. I would rely on it as an intimation only, and if I were going to make a shipment I would check with the steamship company as to current dates.

Mr. Graham. Q. Being familiar with the export trade, as you have testified you are, do you know whether the export trade would place any reliance on such a schedule, any further than you have testified you would place any reliance on it?

Mr. Sapiro. The same objection.

The Commissioner. The same ruling.

A. I think no more."

And further (Tr. 386):

"If you received such a letter as that, dated as it is, and had in mind making shipments on the 'Hindanger' on March 24th, would you place any reliance on the statement as to time of departure and arrival, as shown there?

Mr. Sapiro. The same objection.

The Commissioner. The same ruling.

A. As between January 27 and March 24 I certainly would not rely on it as authentic information without checking further.

Mr. Graham. Q. How would you get that further information as to dates, schedule, and length of voyage?

Mr. Sapiro. Just a moment. That was not the last answer the witness made.

Mr. Graham. I would like to have the record read.

(Record read.)

Q. What would your answer be as to the schedule of the vessel? You have limited your previous answer as to departure and arrival.

A. You mean the length of the voyage, do you?

Q. The length of the voyage.

A. Well, as to the length of the voyage also, because ships of that line and others to South America have optional ports, if inducements offer, and those things change from day to day. Naturally, each additional port means additional time."

In the light of the evidence, the voyage of the 'Hindanger' was neither unreasonably long nor was there any delay for which these respondents, appellees, should be held at fault. Such was the finding of the Commissioner and the court below, and this finding should be affirmed.

VI.

THE DECREE OF THE TRIAL COURT SHOULD BE AFFIRMED AND THE LIBELS DISMISSED.

The decree of the trial court dismissing the libels should be affirmed. "No oral contracts were consummated between the parties" (Tr. 87). "The rights of the different parties, including the question of deviation, must necessarily be determined by the bills of lading" (Tr. 88). "Clearly the bills of lading involved in the instant matters endow the vessel with

a liberty to call at ports in geographical rotation, as did the 'Hindanger'" (Tr. 88). "No negligent delay has been shown. Stopping and discharging cargo at the different ports (in geographical rotation) between San Francisco and Buenos Aires was not a deviation; and the time consumed on said voyage was not a deviation" (Tr. 88). "The libels should, therefore, be dismissed" (Tr. 89), and the decree of the District Court affirmed.

Dated, San Francisco,
March 9, 1934.

Respectfully submitted,
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